# In the
# Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1623

SIDNEY F. BROWN, JR.,
Petitioner

versus

DAVID C. LUNDGREN, WARDEN FEDERAL CORRECTIONAL INSTITUTION,
Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DONALD R. SCOGGINS
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# INDEX

## LIST OF AUTHORITIES



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Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on March 18, 1976, which became final on March 18, 1976, with no Petition for Rehearing being filed, nor was an extension of time sought for filing of a Petition for Rehearing.

## CITATION TO OPINION BELOW

The original notice from the Board of Parole denying parole appears as Appendix "A"; the affirmation of this decision following the Regional Appeal appears as Appendix "B", and the National Appeal Denial and Reasons appears as Appendix "C" and "C-1".

The opinion of the United States District Court for the Northern District of Texas is not reported in a bound volume but both the *Findings, Conclusions and Recommendation of the United States Magistrate* and the *Order* adopting same,

signed by the Honorable William M. Taylor, Jr., United States District Court Judge, each styled *Sidney F. Brown, Jr., vs. David C. Lundgren, Warden, Federal Correctional Institution*, Civil Action No. C. A. 3-75-0571-C, are pended hereto as Appendix "D".

The opinion of the United States Court of Appeals for the Fifth Circuit, No. 75-3184, delivered March 18, 1976, is, as yet, not reported in a bound volume but is appended hereto as Appendix "E".

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 18, 1976. No Petition for Rehearing was filed, nor was a request to extend time requested and the judgment became final on March 18, 1976.

The jurisdiction of this Court is invoked under 28 U.S. C.¶ 1254 (1).

## QUESTIONS PRESENTED FOR REVIEW

Question Number One: Did the United States Court of Appeals for the Fifth Circuit correctly determine that the expectation of parole release while still in otherwise lawful custody is not a "grievous loss" in the Constitutional sense?

By first determining that the denial of parole did not constitute a "grievous loss", the Fifth Circuit Court of Appeals was able to leave unanswered the question presented of whether the procedures of the Parole Board in the instant case denied constitutional due process.



Question Number Two: Can the United States Board of Parole, consistent with the Fifth Amendment to the Constitution of the United States, deny parole to an inmate for a period of months in excess of the outer limit of the range of months of confinement to be served before parole which limits are established by the Board of Parole in its Guidelines for Decision Making? As the basis for disregarding the published guidelines, the Board used information which the District Court Judge considered in setting the period of confinement at the time of the original sentencing; which same information was thereafter considered by the Board of Parole in assigning a "salient factor score" to the Petitioner which score is instrumental in determining the range of months the offender will be required to serve in confinement; the Board then used the same information for a third time to arbitrarily "jump" the Petitioner into a higher "offense severity" category with a comensurate longer period of months to be served before parole, than the offense for which he was actually convicted dictates.[1]

Question Number Three: Can a federal prisoner seeking to challenge the decision of the United States Board of Parole do so by naming the Warden of the institution in which he is incarcerated as the Respondent in his Petition for a Writ of Habeas Corpus; or stated otherwise, must a prisoner, without regard to where he is in custody or who has cus-

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1. "Offense behavior and "salient factor score" as used by the Board, refer to the Board's Guidelines which set forth length of time to be served prior to parole for combinations of two variable factors: the severity of the offense (Appendix F) and the characteristics of the offender (Appendix G). These two factors applied to the Board's Guidelines then give a range of months for the offender to serve. (Appendix F).

tody of his person, sue the United States Board of Parole to determine the legality of his continued incarceration as a result of the denial of parole. This question was not answered by the Fifth Circuit because the Board of Parole was not named a respondent.

Question Number Four: Does the publication by the United States Board of Parole of its Guidelines for Decision Making, pursuant to the Administrative Procedure Act, create a statutory right by an inmate to have the Board comply with the Guidelines and does a subsequent departure by the Board form its Guidelines make the inmate's custody illegal and create the corresponding right to release on parole?

Question Number Five: If minimal constitutional due process is due, or if this Court should find that the Board is bound by the perimeters of its published guidelines, then has this Petitioner, Sidney F. Brown, Jr., been illegally denied parole under the facts of this case?

Question Number Six: Finally, did the United States Court of Appeals for the Fifth Circuit erroneously conclude from the record before it that Petitioner was, at his original parole hearing, correctly informed of the reasons used by the Board to increase his offense severity classification, if such increase is consistent with the law?

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional provisions relevant to Question Number One:



*The United States Constitution, Sec. 9, Clause 2: The privilege of the Writ of Habeas Corpus shall not be suspended unless when in cases of rebellion or invasion, the public safety may require it.*

**UNITED STATES CONSTITUTION-FIFTH AMENDMENT**

*No person shall . . . be deprived of life, liberty, or property, without due process of law. . .*

**28 U.S.C. ¶ 2241 (C):**

*The Writ of Habeas Corpus shall not extend to a prisoner unless -*

*(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof, or*

*(2) He is in custody for an act done or ommitted in pursuance of an act of Congress, or an order, process, judgment or decree of a court or judge of the United States, or*

*(3) He is in custody in violation of the constitution or laws or treaties of the United States;. . .*

**28 U.S.C.¶2242:**

*It [application for a Writ of Habeas Corpus] shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him . . ."*

**28 U.S.C.¶ 2243:**

*The writ or order to show cause shall be directed to the person having custody of the person detained. . .*

*The person to whom the writ order is directed shall make a return certifying the true cause of the detention.*

**STATUTES AND REGULATIONS RELEVANT TO QUESTIONS FOUR AND FIVE:**

**5 U.S.C.¶ 701**

*(A) This chapter [judicial review of agency action] applies, according to the provisions thereof, except to the extent that -*

*(1) Statutes preclude judicial review; or*

*(2) Agency action is committed to agency discretion by law.*

*(B) For the purpose of this chapter-*

*(1) "Agency" means each authority of the Government of the United States whether or not it is within or subject to review of another agency, but does not include-*

*(a) The Congress;*



*(b) The Courts of the United States;*

*(c) The governments of the territories or possessions of the United States;*

*(d) The government of the District of Columbia.*

**5 U.S.C. 703**

*The form of proceeding for judicial review [of agency action] is the special statutory review proceeding relevant to the subject matter in a court specified by statute. . . or any applicable form of legal action, including actions for declaratory judgment or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.*

**STATEMENT OF THE CASE**

Petitioner, Sidney F. Brown, Jr., who is confined in the Federal Correctional Institute at Seagoville, Texas, on May 12, 1975, filed a petition in the United States District Court for the Northern District of Texas for a Writ of Habeas Corpus pursuant to 28 U.S.C. ¶ 2241 (c). Petitioner is confined as a result of his conviction in the United States District Court for the Western District of Louisiana under a

two count indictment alleging in each count the unlawful distribution of D, 1-Amphetemine on August 2 and August 6, 1973. Petitioner plead guilty to the charge on May 4, 1973, and was sentenced as an adult offender to five years confinement. No appeal was taken. This Petition for Writ of Habeas Corpus is based upon the fact that Petitioner's liberty is unlawfully restrained because he has been illegally denied, by the United States Board of Parole, the opportunity to be paroled within the time period for parole established by the Board of Parole for all other persons who are confined for similar offenses and with behavioral characteristics similar to his own.

## EXHAUSTION OF ADMINISTRATIVE REMEDIES

Petitioner was originally considered for parole in February, 1975, after having been confined in the Federal System since July 6, 1973. On February 14, 1975, he was notified by the United States Board of Parole that parole had been denied and he was required "to continue for institutional review hearing in October, 1976." As provided by Board rules, a Regional Appeal of the Board decision was instituted, which appeal was denied on February 21, 1975 (See Appendix B). Thereafter, a National Appeal of the affirmation to the National Appeal Board in Washington was instituted. The National Appellate Board affirmed the previous decision (See Appendix C). This Petition for Writ of Habeas Corpus followed.

## BASIS FOR THE PAROLE BOARD'S DENIAL OF PAROLE

In the instant case, the Board ultimately gave four reasons for denying parole to Petitioner as follows:



**REASONS:** *(1) "Your offense behavior has been rated as very high severity. You have a salient factor score of 7. You have been in custody a total of 19 months. (2) Guidelines established by the Board for adult cases which consider the above factors indicate a range of 36-45 months to be served before release for cases with good institution program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the Guidelines at this consideration does not appear warranted. (3) The offense behavior consisted of multiple separate offenses. (4) Prior record shows history of assaultive or violent conduct is present demonstrating a potential for assaultive behavior".*

Reasons number (1) and (2) above as stated by the Board for parole denial are erroneous in that while the Board has rated the offense behavior as "very high severity", such classification is patently incorrect. The proper offense severity for the offense for which this Appellant was convicted, i.e., the distribution of D, 1-Amphetamine, should be "high" for the sale of "soft drugs" ($500-$5,000), with a time to be served of from 20 to 26 months (Appendix F). Sidney Brown has been confined since July, 1973.

The Court will note (Appendix A) that the original reasons given by the Board of Parole for denial of parole offered no explanation of the classification but simply rated the offense as "very high severity" and that with a salient factor score of 7, the time indicated to serve was 36 to 45 months, an apparently superficial justification for the extended set off.

Thereafter, the National Appellate Board gave additional reasons for denying parole, these being that (3) the offense behavior consisted of multiple separate offenses and (4) prior record shows a history of assaultive type conduct.

The denial of due process argument focuses, first on the fact that Item A in the Salient Factor Score which lowers the score for prior convictions has already taken into account this single ten year old charge; second, Petitioners score has been lowered in Item B for his prior incarcerations. Finally, the Board has established not one specified number of months for release within its Guidelines but rather within each category, there is a range of months which leaves the Board wide discretion even when acting within the scope of its Guidelines. Petitioner acknowledges that factors (3) and (4) as enumerated by the Board in its reasons for denying parole merit consideration by the Board in establishing the exact time period for Petitioner to serve in confinement, but states that these factors must be considered within the proper 20 to 26 months category. Such factors might very well establish release at a time later than the minimum of 20 months but not beyond the 26 months maximum established by the Guidelines. Petitioner suggests that factors (3) and (4) are of not such significance as to merit the due process denial inherent in the complete and arbitrary reclassification of Sidney into a category inappropriate under the Guidelines.

Not only is this Petitioner required to suffer the "grievous loss" of completing his sentence inside an institution's walls-a loss suffered in common by all who are denied parole-but in the instant case, denial of parole led to termination of Sidney Brown's weekend furlough status (which had been in effect for six months) and even though Sidney had been approved for outside study release (attendance at a local coll-



ege) by institution officials, he has been unable to participate in this program because of the extended set-off for parole.

When Sidney Brown's offense severity is properly categorized, he would have to have a total score on the Salient Factor Consideration (Appendix G) of from 0-3, instead of his actual total of 7, to warrant a set-off of from 32-38 months. There is no 45 month salient factor score possible in the appropriate category of "high". The Board has written off the page to reach the 45 month set-off.

Finally, the Board's arbitrary action in "continuing for review hearing until October", 1976, has, in effect, denied serious parole consideration altogether and required that confinement continue to expiration. Not only has Sidney Brown been receiving the statutory 8 days per month "good time"[2] but because of his excellent disciplinary and work record, he has, since January, 1974, been receiving an additional 3 days per month credit for meritorious good time;[3]. This 3 days per month credit has been increased to 5 days per month as of January 1,1975, which additional meritoious good time credit places Sidney Brown's mandatory release date in the month of October, 1976–the same month that he will be reconsidered for parole. Thus, by this set-off, the Board has in effect determined that it would never give serious consideration to Petitioner's parole application.

## AMPLIFIED REASONS FOR GRANTING WRIT OF CERTIORARI

The following cogent reasons exist for granting this Application for Writ of Certiorari:

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2. 18 U.S.C.§4161.
3. 18 U.S.C.§4162.

1. The finding of the Fifth Circuit Court of Appeals that denial of parole is not a "grievous loss" in the Constitutional sense is squarely and diametrically opposed to the recent findings of the Court of Appeals for the District of Columbia that denial of parole is a "grievous loss" in the Constitutional sense, *Childs vs. United States Board of Parole,* (1974) 511 F.2d 1270. Not only are the two circuit courts' conclusions in this question wholly inconsistent, but it can be reasonably anticipated that the several other circuit courts of appeals will be called upon to resolve this same question presented in the context of the recently published Guidelines for Parole Decision Making, by prisoners who believe themselves to have been aggrieved by parole board decisions made outside the published Guidelines.

2. Secondly, the issues presented in the instant case provide the vehicle through which the reciprocal question left unanswered in *Morrissey v. Brewer,* 1972, 408 U.S. 484, i.e., does constitutional due process apply in the federal system to the consideration of parole and, if so, what minimal process is due, may be answered.

In another context, this Court has previously declared that imposition of a more severe sentence after retrial "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *North Carolina v. Pearce* (1969) 395 U.S. 711 at 726. Should not a similar rationale apply for the parole board to



continue incarceration beyond the period contemplated by the Board's own Guidelines?

3. The Court can resolve the procedural question which was neither raised nor briefed by either party before the United States Court of Appeals for the Fifth Circuit but which issue was decided by the Court in its opinion of whether, first, habeas corpus as permitted by the United States Constitution, Acts of Congress and the Administrative Procedure Act, is the appropriate vehicle to test the legality of continued incraceration based upon decisions by the United States Board of Parole and, secondly, whether naming the warden of the institution in which the Petitioner is incarcerated, as apparently was intended by Congress in 28 U.S.C. ¶ 2242, *supra,* is adequate notice to the government to resolve the legality of the restraint; or must the United States Board of Parole be made a party to the suit by Petitioner; or if the Board is a necessary party, should the United States Board of Parole be impleaded by the warden as suggested in 28 U.S.C. ¶ 2243, *supra,* or should some other party, e.g., the Department of Justice or Attorney General be petitioned?

While *Morrissey v. Brewer, supra,* supports Petitioner's position that the action of the parole board can be questioned by naming only the warden as respondent, the question was apparently not specifically decided in that decision.

Respectfully submitted,

DONALD R. SCOGGINS
1015 Elm Street, Suite 2000
Dallas, Texas 75202
Attorney for Petitioner

## CERTIFICATE OF SERVICE

I, Donald R. Scoggins, Attorney for Petitioner, certify that copies of the foregoing Petition for Writ of Certiorari were served upon William O. Wuster, Assistant United States Attorney, by depositing same in the United States Mail, first class postage prepaid and addressed to William O. Wuster, Assistant United States Attorney, 310 United States Courthouse, 10th & Lamar Streets, Fort Worth, Texas, 76102; and that service was made in the same manner upon the Solicitor General, Department of Justice, Washington, D.C., 20530, both done on this 21st day of April, 1976.

DONALD R. SCOGGINS
1015 Elm Street, Suite 2000
Dallas, Texas 75202
214 742-1694
Attorney for Petitioner

Appendix A

Parole Form H-7(a)
(Rev. June 1974)

UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington, D.C. 20537

RECEIVED
FEB 14 1975
Warden's Office
Federal Correctional Institution
Seagoville, Texas

**Notice of Action**

*Name* Sidney Franklin Brown, Jr.

*Register Number* 20984-149 *Institution* FCI Seagoville

In the case of the above-named, the Board has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release was ordered:

Continue for Institutional Review Hearing October, 1976.

Conditions or remarks:

Reasons for denial, continuance or revocation: (Use separate sheet if necessary)

Your offense behavior has been rated as very high severity. You have a salient factor score of seven. You have been in custody a total of 19 months.

Guidelines established by the Board for Adult cases which consider the above factors indicate a range of 36 to 45 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration does not appear warranted.

Very disappointed in above action N.B.
U.S.P.O.
Ft Worth, Tx.

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Director.

B. Decision of the National Appellate Board referred to it for reconsideration. Appeal may be made to the Regional Director.

C. Decision of the Regional Director. Appeal may be made to the National Appellate Board.

D. Decision of Regional Directors in cases where they assumed original jurisdiction. Appeal may be made to the National Appellate Board.

February 13, 1975
(Date Notice sent)

South Central
(Region - Specify)

sla
(Docket Clerk)

National Appellate Board
(Check)

Appendix B

Parole Form H-29
(Rev. Dec. 1973)

UNITED STATES DEPARTMENT O USTICE
United States Board of Parole
Washington, D.C. 20537

7

Notice of Action on Appeal

*Name* Sidney F. Brown

*Register Number* 20984-149 *Institution* Seagoville

REGIONAL APPEAL: The appeal by the above-named has been carefully examined by the Regional Director(s) and the following was ordered:

X Affirmation of the previous decision.

____ Reversal or modification of the previous decision, as follows:

_____

____ An institutional hearing during the month of _____

____ A regional appellate hearing before the Regional Director.

You have a right to appeal this order to the National Appellate Board. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole (or his equivalent), within 30 days of the date shown below.

---

NATIONAL APPEAL: The appeal by the above-named has been carefully examined by the National Appellate Board and the following was ordered:

____ Affirmation of the previous decision.

____ Reversal or modification of the previous decision as follows:

_____

____ An institutional hearing during the month of _____

____ A rehearing at the regional appellate level.

____ A hearing before the entire Board (applicable only in cases where the Regional Directors assumed original jurisdiction).

All decisions by the National Appellate Board on appeals are final.

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2-21-75 (Date Notice sent)

South Central (Region specify)

PJP (Docket Clerk)

National Appellate Board ____ (Check)

Appendix C

Parole Form H-29
(Rev. Dec. 1973)

UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington, D.C. 20537

7

Notice of Action on Appeal

*Name* Sidney F. Brown, Jr.

*Register Number* 20984-149 *Institution* Seagoville

REGIONAL APPEAL: The appeal by the above-named has been carefully examined by the Regional Director(s) and the following was ordered:

____ Affirmation of the previous decision.

____ Reversal or modification of the previous decision, as follows:

_____

APR 1 2 1975

____ An institutional hearing during the month of _____

Warden's Office
Federal Correctional Institution
Texas

____ A regional appellate hearing before the Regional Director.

You have a right to appeal this order to the National Appellate Board. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole (or his equivalent), within 30 days of the date shown below.

---

NATIONAL APPEAL: The appeal by the above-named has been carefully examined by the National Appellate Board and the following was ordered:

XXX Affirmation of the previous decision. Reasons amended--see attached sheet.

____ Reversal or modification of the previous decision as follows:

_____

____ An institutional hearing during the month of _____

____ A rehearing at the regional appellate level

____ A hearing before the entire Board (applicable only in cases where the Regional Directors assumed original jurisdiction).

All decisions by the National Appellate Board on appeals are final.

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April 9, 1975 (Date Notice sent)

____ (Region specify)

NFB (Docket Clerk)

National Appellate Board XXX (Check)

APPENDIX C-1

Re: Sidney F. Brown, Jr.
Reg. No. 20984-149 April 9, 1975

REASONS: (1) Your offense behavior has been rated as very high severity. You have a salient factor score of 7. You have been in custody a total of 19 months. (2) Guidelines established by the Board for adult cases which consider the above factors indicate a range of 36-45 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration does not appear warranted. (3) The offense behavior consisted of multiple separate offenses. (4) Prior record shows history of assaultive or violent conduct is present demonstrating a potential for assaultive behavior.

RECEIVED
April 11, 1975
Warden's Office
Federal Correctional Institution
Seagoville, Texas



APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FILED: July 25, 1975

SIDNEY F. BROWN, JR.
VS. CIVIL ACTION NO. CA-3-75-0571-C
DAVID C. LUNDGREN, WARDEN,
FEDERAL CORRECTIONAL INSTITUTION

FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE

Pursuant to the provisions of 28 U.S.C. 636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the Magistrate, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Sidney F. Brown, Jr.. hereinafter called applicant, is presently in custody of the Attorney General of the United States and confined in the Seagoville Correctional Institution in this district. He contends that the Board of Parole failed to follow its published guidelines in considering his application for parole. Applicant is held pursuant to a judgment of conviction and sentence imposed against him in the United States District Court for the Western District of Louisiana following his plea of guilty to a two count indictment charging him with distribution of Amphetamine Sulfate, a Schedule II non-narcotic controlled substance. He advances the following grounds for relief:

1. He argues that the Board improperly classified his offense behavior as "very high severity." He argues that amphetamines are not "hard drugs" which would place the offense characteristics into the "very high" category, but

rather are soft drugs which would fit the offense into the "high" offense characteristics. In reply, respondent concedes that under the examples of offense behaviors listed in Section 2.20, 28 C.F.R., applicant's offense would fall in the "high" category. He argues, however, that it is the policy of the Board to consider the full context in which the offense was committed in making the proper category determination and that Section 2.20(d), 28 C.F.R., authorizes and justifies the Board's decision to classify the offense behavior in applicant's case as "very high." The answer reflects that the classification was predicated on factors other than the type of drug involved. The precise reasons assigned by the Board in determining the offense behavior were that the offense behavior consisted of multiple separate offenses and that applicant had a prior record of assaultive or violent conduct. His salient factor score was fixed at 7, a determination which applicant does not challenge. Under the Board's guidelines, the average time before release on parole under its determination in applicant's case is 36-45 months. Section 2.20, 28 C.F.R.

2. Applicant contends that the Board's action has, in effect, denied him serious parole consideration altogether.

I believe the records reflect that the Board's action in this case cannot be determined to be arbitrary or capricious. I believe the record further reflects that whatever may be the wisdom of the Board's decision, the published guidelines were followed by the Board in arriving at its decision. It is well settled that eligibility for parole is within the wide latitude of discretion vested in the Board of Parole. *Thompkins v. U. S. Board of Parole,* 427 F.2d 222; *Sexton v. Wise,* 494 F.2d 1176 (5th Cir., May 30, 1974).

RECOMMENDATION:

For the reasons stated hereinabove, I recommend that all relief sought by applicant be denied.

(Signature Illegibile)
UNITED STATES MAGISTRATE



APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FILED:
Jul 25, 1975
Joseph McElroy, Jr., Clerk
By Deputy

SIDNEY F. BROWN, JR.
VS. CIVIL ACTION NO. CA-3-75-0571-C
DAVID C. LUNDGREN, WARDEN,
FEDERAL CORRECTIONAL INSTITUTION

ORDER

After making an independent review of the pleadings, files and records in this case, and the findings conclusions and recommendation of the United States Magistrate, I am of the opinion that the findings and conclusions of the Magistrate are correct and they are adopted as the findings and conclusions of the Court. The findings and recommendation of the Magistrate shall be filed herein as a part of the record in this case.

IT IS, THEREFORE, ORDERED that all relief sought by applicant is denied.

IT IS FURTHER ORDERED that the Clerk shall transmit a true copy of this order, together with a true copy of the Findings, Conclusions and Recommendation of the United States Magistrate, to applicant and his attorney of record, and to the United States Attorney, Northern District of Texas.

SIGNED AND ENTERED this 25th day of July, 1975.

s/ Wm. Taylor, Jr.
UNITED STATES DISTRICT JUDGE

**Sidney F. BROWN, Jr.,**
**Petitioner-Appellant,**

**v.**

**David C. LUNDGREN, Warden,**
**Federal Correctional Institution,**
**Respondent-Appellee.**

**No. 75-3184.**

United States Court of Appeals,
Fifth Circuit.

March 18, 1976.

An inmate of a federal prison filed a petition for a writ of habeas corpus, challenging a decision of the United States Board of Parole which effectively denied him eligibility for parole until his mandatory release date. The United States District Court for the Northern District of Texas, at Dallas, William M. Taylor, Jr., Chief Judge, dismissed the petition, and the prisoner appealed. The Court of Appeals, Bell, Circuit Judge, held, inter alia, that the mere expectation of parole release while still in otherwise lawful custody is not so vested as to result in a "grievous loss" if denied by the Parole Board, and that the Court would therefore not consider whether the procedures of the Parole Board denied constitutional due process.

Affirmed.

Godbold, Circuit Judge, concurred specially and filed opinion.

**1. Constitutional Law ⇐272**
**Habeas Corpus ⇐113(12)**

While parole revocation and prison discipline are clearly within ambit of due process clause of Fifth and Fourteenth Amendments, mere expectation of parole release while still in otherwise lawful custody is not so vested as to result in "grievous loss" if denied by Parole Board; Court of Appeals, in habeas corpus action instituted by federal prisoner, therefore would not consider whether procedures of United States Board of Parole which effectively denied prisoner eligibility for parole until his mandatory release date denied him constitutional due process. 28 U.S.C.A. § 2241(c), (c)(3); U.S.C.A.Const. Amends. 5, 14.

**2. Habeas Corpus ⇐25.2(4)**

In case of prisoner in federal custody, absolute constitutional claim does not necessarily vitiate right of prisoner to review by habeas corpus of denial of his parole by United States Board of Parole if such denial causes his custody to be in violation of statutory "laws of the United States," as where Board, being subject to Administrative Procedures Act, fails to act in accordance with requirements of that Act or with its own established guidelines. 5 U.S.C.A. §§ 554, 555(e), 701(a), 703; 28 U.S.C.A. § 2241(c).

**3. Pardon and Parole ⇐7**

Merits of decision whether to allow parole to prisoner is subject to review by federal court only where decision is alleged to be so arbitrary and capricious as to be beyond discretion of United States Board of Parole. 5 U.S.C.A. § 701(a).

**4. Habeas Corpus ⇐25.2(4)**

Federal prisoner challenging decision of United States Board of Parole or process by which that decision was reached must show that action of Board was so unlawful as to make his custody in violation of laws of United States; there must be sufficient nexus between alleged illegal action and legality of his custody for habeas corpus to lie. 28 U.S.C.A. § 2241(c).

**5. Pardon and Parole ⇐1**

Federal prisoner has no right to release on parole; he has only statutory right to have Parole Board comply with Administrative Procedure Act and its own rules and guidelines; departure by Board from such standards does not necessarily make prisoner's custody illegal. 5 U.S.C.A. § 703.

**6. Pardon and Parole ⇐5**

United States Board of Parole did not abuse its discretion, when adjusting degree of offense severity for purposes of determining eligibility for parole, in giving "very high" offense severity rating where prisoner's offense did not fall within example given for that category or in using same factors to establish salient factor score and to raise offense's severity.

**7. Pardon and Parole ⇐7**

Where federal prisoner was informed of reasons for higher offense severity classification and was allowed to contest such reasons at initial parole hearing, and where context of prisoner's federal arrest and information in presentence report was considered at same hearing and were also subject to challenges by prisoner, later use of such reasons by national board to affirm denial of parole by local board did not constitute post hoc determination which prisoner was never allowed to contest.

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Appeal from the United States District Court for the Northern District of Texas.

Before BELL, GODBOLD and RONEY, Circuit Judges.*

BELL, Circuit Judge:

This case involves the extent to which a federal court may judicially review the parole release process of the United States Board of Parole, on the basis of a petition for writ of habeas corpus against the warden who has custody of the prisoner seeking such relief. Appellant Sidney F. Brown, Jr., challenges a decision of the Parole Board that effectively denies him eligibility for parole until his mandatory release date. The Parole Board was not named as a respondent. We find only a narrow jurisdictional base for such a petition, and affirm the order of the district court denying relief because Brown has not alleged facts that place him on that base.

Appellant Brown was first considered for parole in February, 1975, after being confined in the federal system since July 6, 1973. The local parole board denied him parole on the basis of its guidelines for the release of adult offenders set forth at 28 C.F.R. § 2.20 (1975). These guidelines establish ranges of confinement within which the board will consider an offender as eligible for parole. The particular range is determined by a combination of two factors—(1) offense characteristics: severity of offense behavior, and (2) offender characteristics: parole prognosis (salient factor score).

The salient factor score is mechanically determined on the basis of nine factors, such as prior convictions and incarcerations, prior drug involvement, family situation, job expectations and the like. Brown was given a salient factor score of seven, which he does not challenge.

The degree of offense severity ranges from "low" to "greatest" in seven steps. The guidelines give a number of examples of offenses that fall within each degree. Brown challenges the determination of the parole board that his degree of offense severity was "very high," as opposed to "high," in that he was only convicted of selling amphetamines, or

* This opinion was concurred in by Judge Bell prior to his resignation from the Court on March 1, 1976.

"soft" drugs, an offense listed within the "high" category. The parole board responds that the guidelines give the board discretion to place an offender in a severity degree one step lower or higher than the degree his offense is listed within, on the basis of mitigating or aggravating circumstances, which it asserts are present here. Brown argues that this was arbitrary and capricious, in that the factors relied on as aggravating circumstances have already been considered in setting the salient factor score, and were implicitly considered by the district court in setting sentence.

Before considering the merits of Brown's contentions, we must first ascertain upon what jurisdictional base we stand in looking at his claim. Brown petitioned the district court for a writ of habeas corpus on the basis of 28 U.S.C.A. § 2241(c), and argues before this court that the decision of the parole board is reviewable under the provisions of the Administrative Procedure Act as well. In order for the writ of habeas corpus to extend to a federal prisoner, that prisoner must be in custody in violation of the Constitution or laws of the United States. 28 U.S.C.A. § 2241(c)(3). Because Brown has sued only the warden and not the board, or first task must be to determine whether Brown has alleged either a federal constitutional or federal statutory wrong by the parole board sufficient to make his custody by the warden unlawful under the terms of the habeas corpus statute.

[1] At the constitutional level, there is a clear distinction between the loss of a statutory privilege once obtained and the denial of that same privilege, never given. While the threatened loss of a privilege may be "grievous" and therefore require some degree of procedural due process protection, *see, e. g., Morrissey v. Brewer*, 1972, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484, the denial of that privilege may only be subject to the procedural demands of the particular enabling statute. Thus, while parole revocation and prison discipline are clearly within the ambit of the Due Process Clause of the Fifth and Fourteenth Amendments, the mere expectation of parole release while still in otherwise lawful custody is not so vested as to result in a "grievous loss" if denied by the parole board. We thus disagree with the characterization by the Court of Appeals for the District of Columbia of the denial of parole as a deprivation of "the valuable features of conditional liberty" equivalent to the loss involved in parole revocation that mandates due process protection. *Childs v. United States Board of Parole*, 1974, 167 U.S.App.D.C. 268, 511 F.2d 1270, 1278.

In any context where it is asserted that constitutional due process is required, the basic, threshold question is whether there is a "grievous loss" of either a liberty or property interest. If there is no such loss, then the second question of whether the particular challenged procedure comports with fundamental fairness is never reached. In short, we find that the denial of parole as distinguished from the revocation of parole as in *Morrissey, supra*, is not a "grievous loss", and we therefore do not consider whether the procedures of the parole board deny constitutional due process.[1]

1. In a different context, the Fourth Circuit has reached a different conclusion. In *Bradford v. Weinstein*, 4 Cir., 1975, 519 F.2d 728, *cert. granted*, 421 U.S. 998, 95 S.Ct. 2394, 44 L.Ed.2d 664, 43 U.S.L.W. 3636 (1975), the court declined to follow the reasoning expressed by this court in the en banc decision in *Scarpa v. United States Board of Parole*, 5 Cir., 1973, 477 F.2d 278, *vacated for consideration of mootness*, 1973, 414 U.S. 809, 94 S.Ct. 79, 38 L.Ed.2d 44, *dismissed as moot*, 5 Cir., 1973, 501 F.2d 992.



[2] In a federal custody situation, however, the absence of a constitutional claim does not necessarily vitiate the right of the prisoner to review by habeas corpus of the denial of his parole by the Board, if such denial causes his custody to be in violation of the statutory "laws of the United States." In particular, if the parole board is subject to the requirements of the Administrative Procedure Act, then its procedures must comport with those required by the Act. A number of other circuits have found that the parole board is in fact subject to the Administrative Procedure Act, insofar as the board is required to give reasons to the prisoner for the denial of his parole. *See King v. United States*, 7 Cir., 1974, 492 F.2d 1337; *Mower v. Britton*, 10 Cir., 1974, 504 F.2d 396. *But see Childs v. United States Board of Parole, supra* at 1281–85 (finds statement of reasons constitutionally required). And, to the extent that the parole board establishes guidelines or procedures under the APA, the Board is as controlled by those rules and procedures as any statutory law. *See United States v. Joseph G. Moretti, Inc.*, 5 Cir., 1973, 478 F.2d 418, 425. *Pacific Molasses Co. v. FTC*, 5 Cir., 1966, 356 F.2d 386, 389–90.

Where a prisoner asserts the failure of the board to comply with the APA or its own guidelines or rules as a basis for a writ of habeas corpus, his petition becomes difficult to distinguish from a simple direct review of the board's decision under the terms of the APA itself. The APA itself expressly authorizes the review of agency action by any applicable form of legal action (absent a special statutory method of review) including a writ of habeas corpus.[2] The pre-APA law of this circuit, however, is that habeas corpus, because of the discretion vested in the Board of Parole, is not an available remedy for a prisoner seeking to challenge a denial of parole by the board.[3] *See Goldsmith v. Aderholt*, 5 Cir., 1930, 44 F.2d 166. Because *Goldsmith* was decided prior to the enactment of the APA, we deem it necessary to consider whether that decision has been modified in any way by the act of Congress.[4]

2. 5 U.S.C.A. § 703 provides, in pertinent part:
The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.

3. A number of decisions of this court have reviewed the merits of district court decisions that have entertained petitions for habeas corpus by prisoners denied parole by the board or aggrieved by other parole board decisions. *Calabro v. United States Board of Parole*, 5 Cir., 1975, 523 F.2d 660; *Sexton v. Wise*, 5 Cir., 1974, 494 F.2d 1176; *Gorham v. Richardson*, 5 Cir., 1973, 483 F.2d 71; *Buchanan v. Clark*, 5 Cir., 1971, 446 F.2d 1379. In each case, this court affirmed the lower court's denial of relief or reversed a grant of relief, on the basis of the broad discretion vested in the parole board, and did not consider the question of the proper jurisdictional base for such petitions. We therefore do not regard these decisions as controlling on the question of our jurisdiction.

4. The unavailability of habeas corpus does not mean that judicial review of the board's actions is completely unavailable. An increasing number of courts have found the Board of Parole to be subject to certain parts of the APA. *See, Pickus v. United States Board of Parole*, 1974, 165 U.S.App.D.C. 284, 507 F.2d 1107; *Mower v. Britton*, 10 Cir., *supra*; *King v. United States*, 7 Cir., *supra*. The Board is an "agency" within the meaning of the APA,

[3] The primary limitation on judicial review under the APA is contained in 5 U.S.C.A. § 701(a).[5] In particular, that clause limits the applicability of the APA to the extent that "agency action is committed to agency discretion by law." The federal courts have always considered the parole board to be vested with broad discretion in deciding whether to grant a parole. *See Calabro v. United States Board of Parole*, 5 Cir., 1975, 525 F.2d 660, 661; *Tarlton v. Clark*, 5 Cir., 1971, 441 F.2d 384, 385. Thus, the merits of the decision whether to allow parole to a prisoner is subject to review by a federal court only where the decision is alleged to be so arbitrary and capricious as to be beyond that discretion. This is not inconsistent with *Goldsmith*, which assumed arbitrary action *arguendo*.

On the other hand, the process by which the board reaches that decision is more readily subject to judicial review, where the board does not comply either with the APA or with its own rules. Such review in no way considers the merits of the Board's decision and is limited to a consideration of those parts of the APA held to be applicable to the Board. For example, in *King v. United States*, 7 Cir., *supra*, the requirement that written reasons be given for a denial of parole was based on 5 U.S.C.A. § 555(e) only. The court in *King* did not hold that all provisions of the APA applied to the Board and was therefore consistent with *Hyser v. Reed*, 1963, 115 U.S.App.D.C. 254, 318 F.2d 225, 236–37, in which Chief Justice (then Judge) Burger held that the parole release decision was not an "adjudication" subject to the procedural requirements of 5 U.S.C.A. § 554, thereby not requiring a formal hearing by the board.

[4, 5] In either case, a prisoner challenging the decision of the board or the process by which that decision was reached must show that the action of the board was so unlawful as to make his custody in violation of the laws of the United States. There must be a sufficient nexus between the allegedly illegal action and the legality of his custody for habeas corpus to lie. A prisoner has no right to release on parole; he has only a statutory right to have the board comply with the APA and its own rules and guidelines. A departure by the board does not necessarily make his custody illegal.

In this case, Brown asserts several grounds in support of his contention that he is illegally being denied parole. He argues that his being given a "very high" offense severity was arbitrary and capricious in that his offense did not fall within the examples given for that category. He further suggests that, even if the parole board may in some cases depart from those examples, the use of the same factors to establish a salient factor score and to raise the offense severity is also arbitrary and capricious. Finally, he argues that the reasons ultimately given by the national board to affirm the denial of parole by the local board were post hoc determinations that he was never allowed to contest.

and the prisoner is sufficiently "aggrieved" to give him standing to seek review of the Board's decision, even though he is not "aggrieved" in any constitutional sense. Because the Board of Parole was not a respondent in this case, we do not reach this question.

5. 5 U.S.C.A. § 701(a) provides:

(a) This chapter applies, according to the provisions thereof, except to the extent that—
(1) statutes preclude judicial review; or
(2) agency action is committed to agency discretion by law.



[6] Given the broad range of discretion vested in the parole board, Brown's first two contentions are without merit. The board's own guidelines allow it to take into consideration aggravating circumstances in setting the degree of offense severity. Such an adjustment based on the individual circumstances of his case clearly falls within the board's discretion. This is equally true of the use of those factors for more than one purpose. We hold that the parole board may, within its discretion, consider such matters in adjusting the degree of offense severity in particular cases. *See also Lupo v. Norton*, D.Conn., 1974, 371 F.Supp. 156.

[7] There would be some merit in Brown's third contention had he never been given an opportunity to contest the factors asserted by the parole board to justify the "very high" classification. *See Grattan v. Sigler*, 9 Cir., 1975, 525 F.2d 329, 331. The record shows, however, that Brown was in fact informed of the reasons subsequently used for the higher classification at the initial parole hearing and was allowed to contest them at that time. The context of his federal arrest and the information in the presentence report were considered at the same hearing and were also subject to challenges by him.

In sum, Brown has alleged nothing that would make his custody by the warden in violation of the Constitution or laws of the United States. The order of the district court denying relief is

Affirmed.

GODBOLD, Circuit Judge (specially concurring).

If I were free to do so I would follow *Childs v. United States Board of Parole*, 167 U.S.App.D.C. 268, 511 F.2d 1270, 1278 (1974), and *Bradford v. Weinstein*, 519 F.2d 728 (CA4), *cert. granted*, 421 U.S. 998, 95 S.Ct. 2394, 44 L.Ed.2d 664, 43 U.S.L.W. 3636 (June 2, 1974), which hold that procedures of the parole board relating to consideration of a prisoner for parole are subject to the demands of due process just as procedures relating to parole revocation. This is the position which I took as one of the dissenters in *Scarpa v. United States Board of Parole*, 477 F.2d 278 (CA5), *vacated for consideration of mootness*, 414 U.S. 809, 94 S.Ct. 79, 38 L.Ed.2d 44 (1973), *dismissed as moot*, 501 F.2d 992 (CA5, 1978). As Judge Winter pointed out, writing for the Fourth Circuit in *Bradford*, the right-privilege distinction, which is central to Judge Bell's conclusion on this matter, has now been eradicated.*

I feel, however, that I am bound, albeit tenuously, by the cryptic decision in *Sexton v. Wise*, 494 F.2d 1176 (CA5, 1974), which, in a single sentence and without discussion or citation of authority, appears to hold that due process protections do not apply until after parole has been granted.

Without reservation I agree with the majority with respect to the availability of review by habeas where a prisoner is held "in custody in violation of the Constitution or laws of the United States", and with the holding on the merits of such review in this instance directed to the statutory "laws of the United States".

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Appendix F



ADULT

[Guidelines for decisionmaking, average total time served before release (including jail time)]

| Offense characteristics: severity of offense behavior (examples) | Offender characteristics: parole prognostic (salient factor score) Very good (11 to 9) | Good (8 to 6) | Fair (5 to 4) | Poor (3 to 0) |
|---|---|---|---|---|
| LOW | | | | |
| Immigration law violations.<br>Minor theft (includes larceny and simple possession of stolen property less than $1,000).<br>Walkaway. | 6 to 10 mo.... | 8 to 12 mo.... | 10 to 14 mo.... | 12 to 16 mo. |
| LOW MODERATE | | | | |
| Alcohol law violations.<br>Counterfeit currency (passing/possession less than $1,000).<br>Drugs: marihuana, simple possession (less than $500).<br>Firearms Act, possession/purchase/sale (single weapon—not altered or machinegun).<br>Forgery/fraud (less than $1,000).<br>Income tax evasion (less than $10,000).<br>Selective Service Act violations.<br>Theft from mail (less than $1,000). | 8 to 12 mo.... | 12 to 16 mo.... | 16 to 20 mo. .. | 20 to 26 mo. |
| MODERATE | | | | |
| Bribery of public officials.<br>Counterfeit currency (passing/possession $1,000 to $19,999).<br>Drugs:<br>"Hard drugs", possession by drug user (less than $500).<br>Marihuana, possession with intent to distribute/sale (less than $5,000).<br>"Soft drugs", possession (less than $5,000).<br>"Soft drugs", sale (less than $500).<br>Embezzlement (less than $20,000).<br>Explosives, possession/transportation.<br>Firearms Act, possession/purchase/sale (altered weapon(s), machinegun(s), or multiple weapons).<br>Income tax evasion ($10,000 to $50,000).<br>Interstate transportation of stolen/forged securities (less than $20,000).<br>Mailing threatening communications.<br>Misprision of felony.<br>Receiving stolen property with intent to resell (less than $20,000).<br>Smuggler of aliens.<br>Theft/forgery/fraud ($1,000 to $19,999).<br>Theft of motor vehicle (not multiple theft or for resale). | 12 to 16 mo.... | 16 to 20 mo.... | 20 to 26 mo.... | 24 to 30 mo. |
| HIGH | | | | |
| Burglary or larceny (other than embezzlement) from bank or post office.<br>Counterfeit currency (passing/possession $20,000 or more).<br>Counterfeiting (manufacturing).<br>Drugs:<br>"Hard drugs" (possession with intent to distribute/sale) by drug user to support own habit only.<br>Marihuana, possession with intent to distribute/sale ($5,000 or more).<br>"Soft drugs", possession ($5,000 or more).<br>"Soft drugs", sale ($500 to $5,000).<br>Embezzlement ($20,000 to $100,000).<br>Interstate transportation of stolen/forged securities ($20,000 to $100,000).<br>Mann Act (no force—commercial purposes).<br>Organized vehicle theft.<br>Receiving stolen property ($20,000 to $100,000).<br>Theft/forgery/fraud ($20,000 to $100,000). | 16 to 20 mo.... | 20 to 26 mo.... | 26 to 32 mo.... | 30 to 36 mo. |
| VERY HIGH | | | | |
| Robbery (weapon or threat).<br>Drugs:<br>"Hard drugs" (possession with intent to distribute/sale) for profit (no prior conviction for sale of "hard drugs").<br>"Soft drugs", sale (more than $5,000).<br>Extortion.<br>Mann Act (force).<br>Sexual act (force). | 26 to 30 mo.... | 30 to 40 mo.... | 40 to 50 mo.... | 50 to 60 mo. |
| GREATEST | | | | |
| Aggravated felony (e.g. robbery, sexual act, aggravated assault)—weapon fired or personal injury.<br>Aircraft hijacking.<br>Drugs: "Hard drugs" (possession with intent to distribute/sale) for profit [prior conviction(s) for sale of "hard drugs"].<br>Espionage.<br>Explosives (detonation).<br>Kidnaping.<br>Willful homicide. | (Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.) | | | |

NOTES

[1] These guidelines are predicated upon good institutional conduct and program performance.

[2] If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.

[3] If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.

[4] If an offense behavior involved multiple separate offenses, the severity level may be increased.

[5] If a continuance is to be given, allow 30 d (1 mo) for release program provision.

[6] "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes



Appendix G



SALIENT FACTOR SCORE

Case name ..... Register No. .....

Item A ..... ☐
No prior convictions (adult or juvenile) = 2
One or two prior convictions = 1
Three or more prior convictions = 0

Item B ..... ☐
No prior incarcerations (adult or juvenile) = 2
One or two prior incarcerations = 1
Three or more prior incarcerations = 0

Item C ..... ☐
Age at first commitment (adult or juvenile) 18 years or older = 1
Otherwise = 0

Item D ..... ☐
Commitment offense did not involve auto theft = 1
Otherwise = 0

Item E ..... ☐
Never had parole revoked or been committed for a new offense while on parole = 1
Otherwise = 0

Item F ..... ☐
No history of heroin, cocaine, or barbiturate dependence = 1
Otherwise = 0

Item G ..... ☐
Has completed 12th grade or received GED = 1
Otherwise = 0

Item H ..... ☐
Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community = 1
Otherwise = 0

Item I ..... ☐
Release plan to live with spouse and/or children = 1
Otherwise = 0

Total score ..... ☐

**§ 2.21 Reports considered.**

Decisions as to whether a parole shall be granted or denied shall be determined on the basis of the application, if any, submitted by the prisoner, together with the classification study and all reports assembled by all the services which shall have been active in the development of the case. These reports may include the reports by the prosecution officers, reports by or for the sentencing court, records from the Federal Bureau of Investigation, reports from the officials in each institution in which the applicant shall have been confined, all records of social agency contacts, and all correspondence and such other records as are necessary or appropriate for complete presentation of the case. Before making a decision as to whether a parole should be granted or denied in any particular case, the Board will consider all available relevant and pertinent information concerning the case. The Board encourages the submission of such information by interested persons.

**§ 2.22 Communication with the Board.**

Attorneys, relatives, or interested parties wishing a personal interview to discuss a specific case with a representative of the Board of Parole must submit a written request to the appropriate regional office setting forth the nature of the information to be discussed. Such personal interview may be conducted by staff personnel in the regional offices. Personal interviews, however, shall not be held by an examiner or member of the Board, except under the Board's appeals procedures.

**§ 2.23 Delegation to hearing examiners.**

(a) There is hereby delegated to hearing examiners the authority to make decisions relative to the granting or denial of parole, or reparole and revocation or reinstatement of parole or mandatory release and to fix conditions of parole.

(b) Hearing examiners shall function as two-man panels and the concurrence of both examiners shall be required for their decision. In the event of a split decision by the panel, the appropriate regional Administrative Hearing Examiner shall cast the deciding vote.

(c) When a hearing examiner panel proposes to make a decision which falls outside of explicit guidelines for parole decision-making promulgated by the Board, the case shall be reviewed by the appropriate regional Administrative Hearing Examiner. When an Administrative Hearing Examiner does not concur in a decision of an examiner panel to set a parole effective date or continuance outside the Board's guidelines he may with the concurrence of the Regional Director modify the date to the nearest limit of the guidelines.

(d) In the event the Administrative Hearing Examiner is serving as a member of a hearing examiner panel or is otherwise unavailable, cases requiring his action under paragraphs (b) and (c) of this section will be referred to another hearing examiner.

**§ 2.24 Review of panel decision by the Regional Director and the National Directors.**

A Regional Director may review the decision of any examiner panel and refer this decision, prior to written notification to the prisoner, with his recommendation and vote to the National Directors for reconsideration and any action deemed appropriate. Written notice of this reconsideration action shall be mailed or transmitted to the prisoner within fifteen working days of the date of the hearing. The Regional Director and each National Director shall have one vote and decisions shall be based upon the concurrence of two votes.

**§ 2.25 Appeal of hearing panel decision.**

(a) A prisoner may file with the responsible Regional Director a written appeal of a decision of a hearing examiner panel or a decision under § 2.24 to grant, deny or revoke parole or to revoke mandatory release. This appeal must be filed on a form provided for that purpose within thirty days from the date of entry of such decision. The appeal shall be considered by the Regional Director who may affirm the decision, order a new institutional hearing, order a regional appellate hearing, reverse the decision, or modify a continuance or the effective date of parole. Reversal of a decision or the modification of such a decision by more than one hundred eighty days, whether based upon the record or following a regional appellate hearing, shall require the concurrence of two out of three Regional Directors. Appellate decisions requiring a second or additional vote shall be referred to other Regional Directors on a rotating basis as established by the Chairman.

(b) Regional appellate hearings shall be held at the regional office before the Regional Director. Attorneys, relatives and other interested parties who wish to appear must submit a written request to the Regional Director stating their relationship to the prisoner and the general nature of the information they wish to present. The Regional Director shall determine if the requested appearances will be permitted. The prisoner shall not appear personally.

(c) If no appeal is filed within thirty days of entry of the original decision, this decision shall stand as the final decision of the Board.

(d) Appeals under this section may be based only upon the following grounds:

(1) The reasons given for a denial or continuance do not support the decision; or

(2) There was significant information in existence but not known at the time of the hearing.

**§ 2.26 Appeal to National Appellate Board.**

(a) A prisoner may file a written appeal of the Regional Director's decision under § 2.25 to the National Appellate Board on a form provided for that purpose within thirty days after the entry of the Regional Director's written decision. The National Appellate Board may, upon the concurrence of two members, affirm, modify, or reverse the decision, or order a rehearing at the institutional or regional level.

(b) The bases for such appeal shall be the same as for a regional appeal as set forth in § 2.25(d). However, any matter not raised on a regional level appeal may not be raised on appeal to the National Appellate Board.

(c) Decisions of the National Appellate Board shall be final.

Appendix H

Form R-2
(Rev. 10/73)

Guideline Evaluation Worksheet

Case Name Sidney Franklin Brown Register Number 20984-149

Salient Factors:

Item A - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - [0]

No prior convictions (adult or juvenile) = 2
One or two prior convictions = 1
Three or more prior convictions = 0

Item B - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - [1]

No prior incarcerations (adult or juvenile) = 2
One or two prior incarcerations = 1
Three or more prior incarcerations = 0

Item C - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - [1]

Age at first commitment (adult or juvenile) 18 years or older = 1
Otherwise = 0

Item D - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - [1]

Commitment offense did not involve auto theft = 1
Otherwise = 0

Item E - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - [1]

Never had parole revoked or been committed for a new offense while on parole = 1
Otherwise = 0

Item F - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - [0]

No history of heroin, cocaine, or barbituate dependence = 1
Otherwise = 0

Item G - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - [1]

Has completed 12th grade or received GED = 1
Otherwise = 0

Item H - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - [1]

Verified employment (or full-time school attendance) for a total of at least 6 months during last 2 years in the community = 1
Otherwise = 0

Item I - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - [1]

Release plan to live with spouse and/or children = 1
Otherwise = 0

Total Score - - - - - - - - - - - - - - - - - - - - - - - - - - - - [7]

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Warden's Office
Federal Correctional Institution
Seagoville, Texas

No. 75-1623



# In the Supreme Court of the United States

OCTOBER TERM, 1976

SIDNEY F. BROWN, JR., PETITIONER

*v.*

DAVID C. LUNDGREN, WARDEN,
FEDERAL CORRECTIONAL INSTITUTION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22-27) is reported at 528 F. 2d 1050. The order of the district court (Pet. App. 21) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on March 18, 1976. The petition for a writ of certiorari was filed on May 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the decision of the Board of Parole denying petitioner's application for parole violated either the Due Process Clause of the Fifth Amendment or the Board's published guidelines for parole release.

## STATEMENT

Petitioner is a federal prisoner currently serving a sentence of five years' imprisonment in the Federal Correctional Institution, Seagoville, Texas. That sentence was imposed following petitioner's plea of guilty on May 4, 1973, to a two-count indictment charging him with two separate acts of having unlawfully distributed amphetamine sulphate, a Schedule II controlled substance, in violation of 21 U.S.C. 841(a)(1). In February 1975 the South Central Office of the Board of Parole (now the Parole Commission)[1] denied petitioner parole on the basis of its guidelines for the release of adult offenders set forth in 28 C.F.R. 2.20 (Pet. App. 15). The Regional Director of the Board of Parole affirmed this decision (Pet. App. 16), and the National Appellate Board also affirmed (Pet. App. 17). Petitioner then filed a petition for a writ of *habeas corpus* in the United States District Court for the Northern District of Texas, alleging that the Board of Parole had failed to follow its published guidelines in considering his application for parole. The district court denied relief, and the court of appeals affirmed.

The release guidelines of the Board of Parole establish ranges of confinement within which the Board ordinarily will consider an offender eligible for parole. The range of confinement is determined in particular cases by a combination of (a) the offense severity level and (b) parole prognosis characteristics. 28 C.F.R. 2.20(b). The regulation provides examples of "offense behaviors for each severity level," but notes that "especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that

[1]See the Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219 *et seq.*



listed" and that "[i]f an offense behavior involved multiple separate offenses, the severity level may be increased" (28 C.F.R. 2.20(d) and n. 4). The "offender characteristics," which are compiled to compute a "salient factor score," include such factors as prior convictions and incarceration, prior drug involvement, family situation, and the like.

Petitioner was notified by the Parole Board that his "offense behavior" had been classified as "very high severity" and that he had been given a salient factor score of seven (Pet. App. 15). The crime of unlawfully distributing amphetamine sulphate, if considered without regard to the context in which it occurred, would have resulted merely in a "high" severity rating and (coupled with petitioner's salient factor score of 7) would have yielded a projected incarceration of 20 to 26 months. The Board told petitioner that it had used the "very high severity" level because his "offense behavior consisted of multiple separate offenses" and his "[p]rior record shows [a] history of assaultive or violent conduct * * * demonstrating a potential for assaultive behavior" (Pet. App. 18).[2] The Board previously had informed petitioner that it regarded as significant: (a) that he had distributed the amphetamine in the instant case while free on bail following his arrest in February 1972 for another sale of amphetamine; (b) that he had admitted to an undercover agent that he had unlawfully distributed drugs for some eleven years; and (c) that he was reputed to be a major source of illegal distribution of amphetamines in the

[2]In July 1965 petitioner had been charged in state court with felonious assault upon his daughter, a minor (see Appendix in the court of appeals, p. 33).

southern United States.[3] According to the Board's guidelines, therefore, petitioner was ordinarily expected to serve a term of 36 to 45 months before his release, whereas he had served only 19 months (Pet. App. 15, 18). The Board further "found that a decision outside the guidelines at this consideration does not appear warranted" (Pet. App. 15).

## ARGUMENT

Petitioner does not question the authority of the Board of Parole to consider both the nature of his offenses and aggravating circumstances such as his prior record. He contends, however, that the Board, after properly considering these factors in computing his salient factor score, arbitrarily used them a second time to classify his "offense behavior" level as "very high" instead of "high." The Board's procedure in twice considering these factors, petitioner asserts, violated fundamental concepts of fairness and therefore denied him due process of law (Pet. 2, 10). He further contends that the Board's own published guidelines were violated (Pet. 4, 12-13).

1. Petitioner's claim that the Board's procedure in this case violated the Due Process Clause of the Fifth Amendment presupposes that in being denied release on parole at the present time he has been deprived of either "liberty" or "property" within the meaning of the Due Process Clause. See generally *Meachum* v. *Fano*, No. 75-252, decided June 25, 1976. The issue whether a prisoner's

[3]The Board's awareness of these facts, as the court of appeals noted (Pet. App. 27), had been made known to petitioner at the initial hearing on his application for parole. See also the affidavit of Gerald Rudolph, Administrative Hearing Examiner of the South Central Office, United States Board of Parole, which was filed with the government's response to petitioner's *habeas corpus* petition (Appendix in the court of appeals, pp. 36-40).



application for release on parole implicates the procedural protections of the Due Process Clause is presently before this Court in *Scott* v. *Kentucky Parole Board*, No. 74-6438, certiorari granted, December 15, 1975.

Our brief as *amicus curiae* in *Scott* argues that when, under the governing law, the decision to grant or deny parole is completely discretionary—*i.e.*, when no determinable set of facts entitles a prisoner to be released—he has no constitutionally protected liberty or property interest in being released.[4] We observe in our brief (p. 25, n. 14) that, although the federal parole authority's guidelines articulate some objective criteria that influence its release decisions by indicating a "normal" range of release times, the guidelines are expressly subject to the rule that "[t]he granting of parole rests in the discretion of the Board of Parole" (28 C.F.R. 2.18) and that "[w]here the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered" (28 C.F.R. 2.20(c)). Because no set of facts entitles petitioner to be released, the Due Process Clause does not require the use of any particular procedures in making the release decision.

Although one issue presented by petitioner could thus be affected by the decision in *Scott*, we submit that there is no need to hold this case pending disposition of that case. Even assuming that the parole release decision implicates the Due Process Clause, there can be no serious claim in this case that the Board's action in classifying the severity level of petitioner's offense as "very high" was fundamentally unfair. Petitioner's argument rests

[4]A copy of our brief in *Scott* is being furnished to counsel for petitioner.

upon the assertion that in so classifying his offense the Board considered factors that it had already used in computing his "salient factor score." That assertion is only partly correct. In selecting the severity level of the offense the Board considered the fact that petitioner's conviction rested upon the commission of "multiple separate offenses." But while 28 C.F.R. 2.20 (Pet. App. 28, n. 4) specifically provides that this factor may be a basis for increasing the severity level of the offense, the salient factor score worksheet (Pet. App. 29, 30) makes no reference to this factor. Thus, the Board applied an independent criterion specifically authorized by the guidelines in assessing the severity of his offense.

What is more, there is no support for petitioner's apparent argument that the Due Process Clause forbids considering the same facts as part of both the offense severity and the offender characteristics. The Board did not transgress any constitutional command by deciding that it could best make decisions by looking at each fact and separately assessing what effect that fact had upon its evaluation of both offense and offender. Indeed, that is the way most people proceed in the conduct of their daily affairs; the consequences of facts are not assigned to watertight compartments. In considering one fact—petitioner's prior convictions—both in calculating his "parole prognosis" and in assessing the gravity of his current offense, the Board acted within its discretion to consider the complete circumstances of a prisoner's "offense behavior" and consistently with its obligation to ensure that petitioner's release was "not incompatible with the welfare of society" (28 C.F.R. 2.18). As the court of appeals concluded (Pet. App. 27):

> The board's own guidelines allow it to take into consideration aggravating circumstances in setting the degree of offense severity. Such an adjustment



> based on the individual circumstances of [petitioner's] case clearly falls within the board's discretion. This is equally true of the use of those factors for more than one purpose. We hold that the parole board may, within its discretion, consider such matters in adjusting the degree of offense severity in particular cases. See also *Lupo* v. *Norton,* D. Conn., 1974, 371 F. Supp. 156.

2. The argument we have set out above answers petitioner's contention that the Board violated its own regulations. We also observe that violation by the Board of its release regulations is not a ground for relief. The regulations were established for the convenience of the Board and serve to ensure internal operating uniformity. They create no entitlement to release from prison. The Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219, 231, to be codified at 18 U.S.C. 4218(d), provides that actions of the Parole Commission in releasing or declining to release an individual prisoner are "committed to agency discretion" and hence not reviewable under the Administrative Procedure Act, 5 U.S.C. 701.

3. Petitioner contends (Pet. 4) that at his original parole hearing he was not informed of the reasons why the Board ultimately classified his offense behavior as "very high". The court of appeals correctly noted, however, that petitioner was in fact informed of those reasons "and was allowed to contest them at that time. The context of his federal arrest and the information in the presentence report [referring, for example, to petitioner's admission of a history of drug-dealing] were considered at the same hearing and were also subject to challenges by him" (Pet. App. 27). Moreover, petitioner was free to contest the Board's decision, even following its affirmance at the national level, by bringing to the attention of the

Regional Director any "new information of substantial significance" possibly affecting the Board's decision (28 C.F.R. 2.28).[5]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1976.

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[5]Petitioner also seeks review of the issue whether *habeas corpus* "is the appropriate vehicle to test the legality of continued incarceration based upon decisions by the United States Board of Parole" (Pet. 13). But the court of appeals did not decide this issue adversely to petitioner, and its decision did not turn upon the form of the action petitioner had brought. And the court (properly, in our view) allowed petitioner to litigate his grievances with the parole authorities in a suit naming only his immediate custodian as respondent. There is, accordingly, no reason for this Court to consider this issue.